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TABLE OF AUTHORITIES

CASES:

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In the
Supreme Court of the United States
OCTOBER TERM, 1972

No. 72-1663

SUNRAY-DX OIL COMPANY, a Corporation,
Petitioner,

VERSUS

STANDARD INDUSTRIES, INC., a Corporation, and
METROPOLITAN PAVING CO., INC., a Corporation,
Respondents.

BRIEF FOR PLAINTIFF-RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This Brief is submitted on behalf of two asphalt consuming contractors whose judgment for money damages was affirmed by the United States Court of Appeals for the Tenth Circuit on March 14, 1973.

OPINIONS BELOW AND JURISDICTION

The opinion below and the basis asserted for this Court's jurisdiction is adequately set forth in the Petition and its Appendices.

QUESTIONS PRESENTED

Attempting to tailor its Petition to this Court's published criteria for the grant of *certiorari*, Sunray-DX Oil Company has resourcefully cloaked a commonplace "substantial evidence" argument in fanciful Fifth Amendment

toggery. Petitioner has enunciated three transparent, "evidentiary questions," none of which states, in a straightforward manner, the *only* relevant question involved, which is: "Was there substantial record evidence to support Plaintiff's theory of liability?" This basic question was answered in the affirmative by the jury and trial court below, and this was the basic question presented by Petitioners to the Tenth Circuit Court of Appeals. The Court of Appeals recognized the basic issue before it, gave careful consideration to the contentions of the Petitioner, and with an exhaustive opinion affirmed the decision of the trial court and jury as being based upon substantial evidence. No other basic question would be presented to this Court if it undertook a review of the opinion of the United States Court of Appeals for the Tenth Circuit.

STATEMENT OF THE CASE

Petitioner's statement of the case is misleading because it is slanted and argumentative. For the most part the statement totally ignores the logical inferences which were drawn from the circumstantial evidence by the jury as it resolved contested issues of fact in favor of Plaintiffs and against Defendants. We do not propose to set forth here a complete statement of all the issues involved in the case at bar; however, we propose to correctly set forth the evidentiary framework of Plaintiff's case (together with all legitimate inferences) which was approved by the Court of Appeals.

Plaintiffs proved to the satisfaction of the court and jury below that the Defendants in the case at bar, together with other named refiners in the market, effectively fixed

and maintained the price of liquid asphalt at an artificially high level in an economic market composed of the States of Oklahoma, Kansas and approximately the western half of Missouri during the years 1961 through 1966 (R. 161, pp. 694, *et seq.*; A. 3521-3525. R. 161, pp. 636, *et seq.*, Instruction Nos. 10, 22 and 24; A. 3517).[1] There was evidence demonstrating that the foregoing geographic area constituted the relevant market within which to consider the anti-competitive acts of the industry as a whole, and a portion of the area from which a consideration of prices was necessary in order to compute the damages suffered by the plaintiffs as consumers of liquid asphalt. (*Max*, R. 19, pp. 3147-3148; A. 1424).

During the period of time involved, all petroleum-based products, except one, which were produced from refineries in Kansas and Oklahoma [*i.e.*, gasoline, kerosene, fuel oils, *etc.*] moved easily, *and competitively*, across the Kansas-Oklahoma border; only liquid asphalt was an exception. [*Nourse*, R. 4, pp. 110-111; A. 61-62. *Baker*, R. 5, pp. 144-15, 204; A. 75-76, 91]. The Kansas and Oklahoma based refiners assiduously avoided marketing liquid asphalt across their common border when, had the market been truly competitive, it would have been in their obvious economic self-interest to market as much asphalt as possible in the "high priced" Oklahoma-Kansas sector of this market [*Max*, R. 19, pp. 3185-3186; A. 1448]; however, the asphalt

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[1] References are as follows:

References to witnesses' trial testimony are made by referring to the particular witness' last name. References to the record are to Record Volume Number preceded by the letter "R" and then to page or Exhibit number. References to the Appendix are to the Appendix page number, preceded by the Letter "A".

refiners in both states marketed *millions* of gallons of liquid asphalt in the lower-priced, distant northern markets. [*Mitchell*, R. 10, p. 1125; A. 515. *Noble*, R. 10, pp. 1070, 1088, 1104 and 1114; A. 490, 505. *Max*, R. 19, pp. 3158 and 3185; A. 1430 ad 1448; R. 119, P. Exs. 748, 750, 754, 758, 786 and 787]. As indicated, with practically no pertinent exceptions, liquid asphalt was never marketed competitively, by *any* refiner, across what one witness referred to as the "Berlin Wall." [*Smith*, R. 9, p. 920; A. 438. *Nourse*, R. 4, p. 43; A. 43. *Foose*, R. 5, p. 260; A. 109. *Baker*, R. 5, p. 144; A. 75. *Hibbard*, R. 5, p. 282; A. 119. *Mance*, R. 7, p. 716; A. 327]. The few pertinent exceptions mentioned above, when liquid asphalt *did* move competitively from one state to the other, resulted in economic reprisals either being instituted, or threatened, against persons purchasing liquid asphalt and utilizing it, or attempting to utilize it, on projects "across the border." [*Adams*, R. 33, pp. 5704-5722; A. 2551-2562. *Baker*, R. 33, p. 5752; A. 2568. *Wilkinson*, R. 33, pp. 5788-5790; A. 2588-2589]. The co-operation between the Kansas and Oklahoma refineries which was necessary to construct this interstate economic barrier was fruitful [*Malloy*, R. 12, pp. 1813, 1814; A. 906-907]; it initially allowed the refiners in Kansas and Oklahoma to easily establish *and maintain* high, artificial F.O.B. refinery prices for their product on sales to their respective states. [*Adamson*, R. 6, p. 443; A. 189]. Then, acting in concert, the Oklahoma and Kansas refiners were able to fix and maintain the price in western Missouri. [*Adamson*, R. 6, pp. 350-463; A. 139-200. *Leftwich*, R. 27, p. 4712; A. 2104. R. 38, P. Ex. 276; A. 2763-2763C. R. 42, P. Ex. 648; R. 119, P. Ex. 749]. All of the evidence demonstrated that once this was accomplished,

the price set for the individual state dictated the price charged to *everyone else* who purchased liquid asphalt in that state. [*Hardy*, R. 26, pp. 4433 and 4436; A. 1965-1968. *Mitchell*, R. 13, pp. 1990-1993; A. 978-980. *Cunningham*, R. 23, p. 3911; A. 1724. *Ketcham*, R. 14, p. 2262; A. 1096. *Dahlgren*, R. 11, p. 1569; A. 760-761. *Schimpf*, R. 27, pp. 4738 and 4754; A. 2118. *Max*, R. 34, p. 5876; A. 2630-2631. *Whitson*, R. 18, p. 3033; A. 1360. R. 119, D. Phillips Ex. 12. R. 110, P. Exs. 939, 940 and 941; A. 3159-3163].

Although slightly different mechanical techniques were utilized in fixing the "State" price in each segment of the market, plaintiffs' evidence reflected a basic pattern—a series of uniform, almost indivisible, conspiratorial meetings, spanning a period of many years, held between the "competing" refiners at various places in Oklahoma, Kansas and Missouri. [R. 38, P. Exs. 18, 21; A. 2753-2761. R. 40, P. Exs. 417, 424 and 833; A. 2843, 2867, 2871, 2873, 2899].[2]

The State of Kansas took liquid asphalt bids "FOB Destination." Therefore, it was expedient for the Kansas refiners, during their meetings, to utilize various written instruments to perpetuate their fraud on the Kansas Highway Department, since more than one F.O.B. "base" price had been established for liquid asphalt in Kansas. [*Adamson*, R. 6, pp. 412-444; A. 173-190. R. 42, P. Ex. 649; A. 3001-3001C. One established price was utilized for the El Dorado, Kansas "group" of refineries, and a different base price was utilized for the Kansas City group.] The "work sheets" from which these self-styled competitors rigged their bids,

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[2] See also: R. 38, P. Exs. 39, 51, 55 and 64. R. 42, P. Exs. 579-585, 588-594, 629, 669-673. R. 39, R. 40. R. 41.

thereby establishing collusive, non-competitive asphalt prices to the State of Kansas were introduced into evidence by the plaintiffs.[3] The State of Oklahoma took liquid asphalt bids "FOB Refinery," and all refiners located in the Oklahoma sector of the market maintained high, constant, *identical* F.O.B. refinery prices, and submitted high, constant, *identical* bids to the State of Oklahoma for more than a decade. [*Nourse*, R. 4, pp. 24, 29-32, 49 and 50; A. 25, 28 and 39. R. 119, P. Ex. 761]. There was only one (identical) "base" price for asphalt in Oklahoma, and thus no occasion arose for the Oklahoma conspirators to utilize a "work sheet" to rig the bids to the State of Oklahoma. [*Patton*, R. 13, p. 1971; A. 969. R. 119, P. Ex. 761]. As previously stated, the price of asphalt in Kansas was, roughly, .02¢ per gallon *lower* than the price in Oklahoma [*Ketcham*, R. 14, pp. 221 and 2267; A. 1096, 1099. *Black*, R. 6, p. 514; A. 226]; and, so long as there was no Kansas refiner bidding across the border competitively (*i.e.*, at the *lower* Kansas price)

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[3] These instruments are referred to in the record, by various individuals, as the "bible," the "sheets," the "work sheets," and, perhaps, other appellations. The work sheet was merely an instrument (usually a State Highway Department bid sheet) which was handed to each party (or representative of a party) by the organizer of the clandestine meeting and which had freight rates already computed for the points on which that "competitor" was to be the "low" bidder and to receive, by prearrangement, the award from the State. In those rare instances where it had not already been done on the "sheet" by the organizer of the meeting, the "winning" company had merely to add the attached freight rate to the applicable base price listed on the first page of the instrument, and then bid that total or slightly thereunder. All others bid above that price. These sheets were utilized in the same manner in the market area for a number of years. [*Malloy*, R. 12, p. 1856; A. 929. *Gardner*, R. 11, p. 1294; A. 599. *Noble*, R. 10, p. 1088; A.. 505]. Most of the sheets were destroyed after they had served their purpose [*Mitchell*, R. 10, pp. 1158, *et seq.*: A. 533-534. *Mance*, R. 7, pp. 683-684; A. 309. However, plaintiffs were able to secure the Kansas "sheet" for one of the years in question.

to the State of Oklahoma, the price of liquid asphalt to the State of Oklahoma could effectively be fixed and maintained merely by the submission of identical "competitive" bids to the State. This was done by *every* refiner in the State of Oklahoma (including the Petitioner, Sunray-DX Oil Company) on *every* State asphalt letting (each of which called for the submission of secret, sealed bids) during *every* year from 1954 through 1965, inclusive. [R. 119, P. Ex. 761]. This was the *only* product purchased by the State of Oklahoma under its competitive bidding procedure which behaved, pricewise, in this manner.[4] [*Whitson*, R. 18, p. 3109; A. 1401. *Max*, R. 19, p. 3159; A. 1431. *DePodwin*, R. 32, p. 5553; A. 2472. R. 109, P. Exs. 876-881; A. 3025-3059]. Although the evidence reflects that the Kansas-Oklahoma border was strangely, almost perversely, impervious to liquid asphalt traffic, just the opposite was true of the Missouri border where the Kansas and Oklahoma refiners acted in concert to fix the price of liquid asphalt sold to the Missouri State Highway Department in the western half of Missouri. [*Adamson*, R. 6, pp. 350-412; A. 139-174]. Here, like in Kansas, these "competitors" were dealing with two different F.O.B. base prices, and it was expedient for them to utilize a work sheet to simplify the business of dividing up the Missouri sector of this market, and fixing the price to be charged to the State of Missouri. A copy of an instru-

[4] The record also reflects that every Oklahoma state letting was preceded by a private meeting of the Oklahoma Asphalt Refiners Association. Other evidence of collusion in the Oklahoma sector of the market consisted of correspondence between members of that association, setting forth the points on the upcoming Oklahoma letting on which certain refiners were to bid. [*Carleton*, R. 11, pp. 1432, 1435, 1437-1438, 1440, 1442 and 1456, *et seq.*: A. 678, 680-684. R. 42, P. Exs. 616 and 617; A. 2995-2999. R. 93, P. Exs. 824, 825 and 831; A. 3015, 3021].

ment used one of the years during which the conspiracy was in effect was introduced into evidence.[5] [R. 38, P. Ex. 276; A. 2763-2763C].

The importance of the evidence establishing that the defendants, and others, fixed the price to the individual states comprising this market is fully realized when it is understood that the price paid for liquid asphalt by *every other customer*, whether it was a municipality, county, or private contractor, was based *directly* upon this illegally established and maintained "state" price. [*Mitchell*, R. 13, pp. 1990-1992; A. 978-979. *Schimpf*, R. 27, pp. 4738 and 4754; A. 2118, 2127-2128. *Whitson*, R. 18, p. 3033; A. 1360. *Cunningham*, R. 23, p. 3911; A. 1724. *Dahlgren*, R. 11, p. 1569; A. 760-761. *Max*, R. 34, p. 5875; A. 2630-2631. *Ketcham*, R. 14, p. 2262; A. 1096. *Hardy*, R. 26, pp. 4433, 4436, 4444-4451; A. 1965-1976. *Max*, R. 19, p. 3190; A. 1451-1452].

The absence of voluntary, competitive sales of liquid asphalt across the Oklahoma-Kansas border, the economic reprisals engaged in when customers attempted to bring that product across the state line, when combined with the individual anti-competitive acts undertaken by each of the refiners with respect to sales to their home state and jointly in the western half of Missouri led the jury, the trial court, and the Court of Appeals to the inescapable conclusion that the aforementioned three states were integrally

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[5] The evidence also reflects that there were meetings devoted entirely to the exchange of pre-arranged points on Kansas lettings for pre-arranged points on Missouri lettings. [*Adamson*, R. 6, pp. 381, *et seq.*; A. 155-161. *Mance*, R. 7, pp. 690, *et seq.*; A. 312-314]. The evidence also reflected an Oklahoma meeting at which Oklahoma and Missouri business was discussed. [*Malloy*, R. 12, p. 1754; A. 872-873. *Carleton*, R. 11, pp. 1486-1487; A. 713-714].

a part of the same economic market in which the Kansas and Oklahoma refiners had *not* been freely competing, one against the other, for sales to governmental and private customers. The second conclusion to be drawn from the above is equally obvious. Had such competition ensued, the price of liquid asphalt would have been substantially lower to all customers in the marketplace. [*Max*, R. 34, pp. 5894-5897; A. 2642-2644. *Leftwich*, R. 27, pp. 4713-4716; A. 2104-2105. *Whitson*, R. 18, p. 3035; A. 1361. *Malloy*, R. 12, p. 1779; A. 888].

REASONS FOR DENYING THE WRIT

I

Petitioner's first proposition is that this Court should grant certiorari because the opinion below is in conflict with *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Company*, 346 U.S. 537, 74 S.Ct. 257 (1954), and several similar Circuit Court cases. Quoted is that portion of the *Theatre Enterprises* case holding that parallel business behavior of Defendants, although "admissible circumstantial evidence from which the fact finder may infer agreement," does not *conclusively and solely by itself* prove a Sherman Act offense. Neither we, nor the trial court, nor the Court of Appeals has ever suggested that conscious parallelism *alone* establishes Plaintiff's case—even though in the case at bar the parallel behavior spanned more than a decade.

The *Theatre Enterprises* opinion, unlike the case at bar, involved a jury finding that a conspiracy did *not* exist and accordingly a verdict for the Defendants. As will be demonstrated in II hereof, the record in the instant case

contains extensive and substantial circumstantial evidence in addition to the parallel business behavior from which a permissible conclusion can be drawn that Sunray-DX participated in the conspiracy found to exist. That, in fact, was the holding of the Court of Appeals.

> "There was evidence, both direct and circumstantial, that the price paid by Standard *was fixed by DX* at a figure which was identical and constant with the price charged by Oklahoma refiners *and* that DX was a part of the conspiracy to maintain the price of liquid asphalt at an artificially high figure." [Appendix A. 17]. (Emphasis supplied.)

Consequently, there is absolutely no conflict whatsoever between the Tenth Circuit's above-quoted determination of Petitioner's liability, and the holding of this Court in *Theatre Enterprises*, or the cases following it and relied upon by Petitioner.

II

Petitioner's proposition II(A) proceeds from the premise that it was subjected to "incalculable" prejudice by the introduction of evidence of conspiratorial activity in the relevant market. Petitioner states that evidence consisting of acts and declarations of its co-conspirators in the Missouri and Kansas sector of the relevant market was improperly admitted against Petitioner. Specifically, Petitioner complains that:

> "Given the inflammatory nature of this evidence, it is improbable that the jury was able, or even willing, to undertake the analysis which would distinguish petitioner from the mass of defendants and alleged co-conspirators." [Petition, p. 12].

One has to go no further than the special verdict interrogatories returned by the jury in the instant case to discover that the Petitioner's conjectural argument is not only self-serving but self-defeating. The same jury which was, according to Petitioner, unable or unwilling to distinguish between Defendants specifically found that Skelly Oil Company was not involved in the conspiracy alleged to have damaged Plaintiffs. This finding was made by the jury *despite* the fact that Skelly *admittedly* participated in the meetings which Petitioner now labels as so "inflammatory" as to preclude rational consideration of the evidence as a whole.[6] Without doubt, if the jury could distinguish between Skelly (who admittedly had personnel present at meetings) and a "mass" of co-conspirators, the same jury obviously could have distinguished between DX (who *says* it had no one present at the same meetings) and the same "mass" of co-conspirators.

Petitioner argues, redundantly, that there must be evidence *aliunde* that it is connected with the conspiracy alleged before evidence of acts and declarations of co-conspirators can be admitted against it. We have no quarrel with that rule of evidence. Neither do we believe that the rule needs to be clarified by this Court. We respectfully submit that as to this Petitioner the evidence showed:

A. Sunray-DX was a member of the Oklahoma Asphalt Refiners Association from its inception in 1954, as were all

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[6] Skelly Oil Company presented a defense based almost solely upon the proposition that it could not, as a marginal refinery, meet the specifications required by the Highway Department of the State of Oklahoma, and, hence, its decision to avoid the Oklahoma sector of the market was based solely upon practical economic necessity, rather than conspiracy.

Oklahoma-based "competitors" of Sunray-DX. [*Carleton*, R. 11, pp. 1409 and 1411; A. 666]. Its asphalt sales manager, Mr. Hardy, twice served as president of the organization, which held meetings the day before each new construction letting by the Oklahoma Highway Department. [*Carleton*, R. 11, p. 1427; A. 675].

B. Although the by-laws of the Association did not so provide it was its "policy" to restrict membership solely to Oklahoma-based refineries. [*Carleton*, R. 11, p. 1426; A. 675. R. 42, P. Exs. 607 and 608; A. 2983a-2989].

C. For more than ten years each member of that Association had submitted *secret, sealed* bids to the State of Oklahoma which were *identical*, price-wise, to that of all other members. [*Baker*, R. 5, pp. 141-143; A. 73-74. *Nourse*, R. 4, p. 50; A. 34. R. 48, P. Ex. 698; A. 3011. R. 49, P. Ex. 701]. (The two temporary, miniscule exceptions to that statement did not involve Sunray-DX).

D. During the same period each member likewise kept in effect "posted prices" (on which sales to contractors were based) which were identical to those of all others. [*Mitchell*, R. 13, pp. 1989-1992; A. 977-979. *Hardy*, R. 26, pp. 4432 and 4433; A. 1965. *Dahlgren*, R. 11, p. 1569; A. 760-761. *Ketcham*, R. 14, p. 2262; A. 1096].

E. Periodically at least one of the members would advise the manager of the Association, in writing, regarding the intentions of his company concerning a state "letting" *prior* to opening of the "secret" bids. [*Carleton*, R. 11, pp. 1437, 1441-1442; A. 682-685. R. 93, P. Exs. 825 and 831; A. 3019-3021]. The files of the Association were open to the membership. [*Carleton*, R. 11, p. 1456; A. 696].

F. Although his stay was comparatively short, Mr. Hardy of Sunray-DX did go to the Trade Winds Motel in Tulsa to "visit" with his "customer" Mr. Saunders, and his "competitors" during that conspiratorial meeting involving, among other things, the fixing of prices and the allocation of territories between the Oklahoma and Kansas refineries of the maintenance sales to the western half of the State of Missouri. [*Hardy*, R. 26, pp. 4422, 4503; A. 1960, 2004, R. 39. *Malloy*, R. 12, p. 1765; A. 879]. There is additional substantial proof that a part of that meeting related to "Oklahoma" business, in which Sunray-DX claims to have been exclusively involved.

G. Sunray-DX did not ever sell asphalt in the State of Kansas, and refused to allow its "customer" (an asphalt *broker* named Saunders Petroleum Company) to sell Sunray-DX asphalt in the State of Kansas.

H. Sunray-DX likewise refused to allow its alleged "customer" (asphalt *broker* Saunders Petroleum Company) to sell Sunray-DX asphalt in the State of Oklahoma.

I. R. L. Saunders of Saunders Petroleum Company entered into a collusive agreement with other defendants and co-conspirators to fix the price for the sale of Sunray-DX produced liquid asphalt in the western half of Missouri, and was indicted and convicted for his efforts.

J. And, of course, Sunray-DX sold liquid asphalt to Plaintiff Standard Industries at a price identical to that extracted from the State of Oklahoma by DX and all other Oklahoma refiners—a "state" price some 3¢ per gallon *in excess of* what the proof showed to be the fair market value of that product.

On page 15 of the Petition, as a reluctant exception to its repeated dogmatic statements that the record contains "no evidence" connecting Sunray-DX to conspiratorial activities in Kansas or Missouri, Petitioner quotes from a letter implicating it in the application of economic pressure on a small Kansas refiner to prevent that refiner from interfering with the economic "Berlin Wall" by continuing to sell asphalt in the State of Oklahoma at the lower Kansas price. Erroneously [but inadvertently, we assume], authorship of that letter was attributed to the President of an Oklahoma contracting concern (who was the *addressee*) whereas the actual author was the President of the small Kansas refinery [a named co-conspirator] who himself, as a witness for the Defendants, had previously testified at the trial in direct contradiction of the statement contained in his letter.

Suffice it to say that the court below had more than enough evidence *aliunde* to connect DX with the overall conspiracy alleged, and permit the introduction into evidence of acts and declarations of co-conspirators in other sectors of the relevant market.

CONCLUSION

Stripped of its grandiloquent format, the basic request of the Petitioner is for this Court to review a 10,000-page record, reweigh the evidence contained therein, and determine whether the court below correctly decided that the jury's verdict was based upon substantial evidence. We respectfully submit that Petitioner's request falls outside of the traditional areas with which this Court concerns itself. We further submit that the substantial evidence rule was

properly applied by the court below, and that the substantial evidence rule itself does not need clarification by the highest Court of the land. The petition should, therefore, be denied.

Respectfully submitted,

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July, 1973

CERTIFICATE

This is to certify that the attached Brief in Opposition has been served by mailing three copies thereof to counsel for each petitioner.

Dated this ..... day of July, 1973.

.....

John Anthony Claro